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Citation

Pimenova, O. (2024). Motivated Criticism in Indigenous Consultations: Why Indigenous Arguments Do Not Convince the Crown. *Proceedings Of The Tenth Conference Of The International Society For The Study Of Argumentation*, 741-753. Retrieved from <https://hdl.handle.net/1887/4107877>

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

Motivated Criticism in Indigenous Consultations

Why Indigenous Arguments Do Not Convince the Crown

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ABSTRACT: The paper reconstructs the dominant discourse of motivated criticism in a distorted reasoning context of Indigenous consultations with the help of the brand new category of Argument Continuity. Argument Continuity traces the effects of institutional power in reasoning exchanges by connecting arguments, counterarguments, and reasoning practices by the more powerful arguers to the resources (evidence sources) and incentives (costs) given by the authority rules of reasoning exchanges. It reveals how rules reinforce biases in consultations.

KEYWORDS: argument continuity, authority rules, motivated criticism

The paper acknowledges and respects the epistemic boundaries between Indigenous Peoples and the Crown within the Canadian administrative system. The research intentionally concentrates on the administrative state and its actors. As a non-Indigenous scholar, I recognize my lack of epistemic and cultural foundations for research utilizing Indigenous knowledge, evidence, and arguments. Despite these limitations, the aim is to leverage the research to support the Indigenous pursuit of procedural justice within colonial systems of administrative law and argumentative reasoning.

1. INTRODUCTION

In Canada, the Crown¹ is legally obliged to engage in consultations with Indigenous peoples when a resource development project has the potential to affect Indigenous communities adversely. Acting honorably, the Crown must provide reasons to show that Indigenous concerns were considered and reveal their impact on their decision (*Haida Nation v. British Columbia* 2004: para 44). “Responsive reasons” is a concept in Canadian administrative law that refers to natural justice and procedural fairness requirements when a decision maker is legally obligated to hear the affected parties and respond to their concerns before making the decision (Evans et al., 1995).

In discharging its duty to consult, the Crown often relies upon designated administrative agencies that have statutory discretion to consult Indigenous communities, assess the project’s effects on Indigenous livelihood, and decide whether the project can be justified for its approval by the Crown. Designing and conducting Indigenous consultations over

¹ The duty to consult applies only to the Crown – the executive branch of Canada’s federal and provincial governments (*Haida Nation v. British Columbia* 2004, para 53). Officials belonging to federal and provincial levels of jurisdictions that have statutory authority to implement the Crown’s duty to consult with Indigenous communities are counted as the “Crown”.

resource projects, an agency is an administrative decision-maker leading Indigenous hearings and whose rulings directly affect Indigenous communities. The agency must conduct hearings by securing the examination and cross-examination of all available evidence and arguments introduced by affected parties and by responding to those arguments with reasons revealing an agency's following the principles of substantial or merits-based rationality in justifying its decision, as "reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties" (*Vavilov v. Canada* 2019: para 127).

The internal rationality of an administrative decision may be called into question "if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations, or an absurd premise" (*Vavilov v. Canada* 2019: para 104). Reasons that repeat statutory language, summarize arguments, and then state a peremptory conclusion will rarely assist in understanding a decision's rationale and are no substitute for a valid inference and judgment. Responsive reasons, as opposed to circular ones, serve as a safeguard against arbitrariness in processing diverse evidence, and the agency must disclose and articulate these reasons in two-sided reasoning over a controversial option.

2. THE MOST RECENT EXAMPLE OF FALLACIOUS REASONING IN INDIGENOUS CONSULTATIONS

During the consultation process for the Trans Mountain Pipeline Expansion Project (TM²), the Crown relied on the National Energy Board (NEB³), a federal agency tasked with regulating interprovincial and international pipeline projects. The NEB, as a singular authority mandated by its statutory act, took on the responsibility of designing and conducting environmental assessments and Indigenous hearings. In its regulatory order, the NEB independently determined the necessity of the TM project, assessed its potential impact on Indigenous interests, and evaluated the potential environmental and socio-economic effects without direct Indigenous participation. Similarly, in its hearing order, the NEB unilaterally established the List of Issues for the hearing process, selected panel members, outlined the types of evidence to be presented, and specified the epistemic procedures to verify evidence. The NEB exercised its discretion in determining the hearing procedure, permitting the testing of evidence through information requests and deciding against cross-examination during the 2014 hearings. This approach resulted in a situation where many Indigenous communities felt unable to fully participate in the Indigenous hearings due to concerns about their capacity to effectively communicate their traditional knowledge, as noted in the Crown Consultation and Accommodation Report 2019 (p. 207). Despite the challenges, Indigenous communities still participated and presented evidence highlighting concerns related to carbon emissions, oil spills, and potential irreparable damage to their traditional lifestyle. The court acknowledged that these

² The existing TM which runs from Edmonton, Alberta, to Burnaby, B.C., is the only major pipeline route for Western Canadian producers to transport their oil to Canada's West Coast. The project would result in the twinning of the existing 1,147-km pipeline system with about 987 km of new buried pipeline.

³ In 2019, the responsibilities of the NEB were transferred to the Canada Energy Regulator (CER) as part of broader regulatory reforms in the energy sector.

concerns were specific and focused, making them relatively straightforward to discuss, address, and respond to (*Tsleil-Waututh Nation et al. v. Attorney General of Canada et al.* 2018: 763). Nevertheless, NEB frequently expressed skepticism, stating that it remained “unconvinced” about the credibility of Indigenous concerns. The agency insisted that further research and data collection were necessary to substantiate these concerns (NEB Reconsideration Report, 2019, p. 397, 435, 457). Numerous Indigenous arguments were dismissed as unconvincing and rebutted with the “repeating tokens of the same counterarguments” without considering their merits (Pimenova, 2022).

At the hearing stage of the TM consultations, NEB was reluctant to depart from its previous finding that supported the project’s assessments submitted as a part of the TM proponent’s application at the regulatory stage. That precluded the Crown from adequately considering and responding to those concerns (*Tsleil-Waututh Nation et al. v. Attorney General of Canada et al.* 2018: para 560). When an agency, supposed to adjudicate the weight of all available evidence on both sides of a project, restates the premises and conclusions of arguments of the project’s proponent in its responses to Indigenous concerns, this agency becomes engaged in one-sided reasoning for a project and motivated criticism towards Indigenous concerns about a project.

3. TESTIMONIAL CREDIBILITY AND CAPACITY TO CONVINC

Indigenous consultations provide a distinct legal venue for Indigenous communities to express their concerns regarding resource development and have these concerns heard and evaluated impartially on their merits. Indigenous resource concerns possess unique epistemic qualities, often stemming from specific approaches to obtaining, testing, and interpreting evidence shaped by firsthand interactions with nature (Valadez, 2010). Unfortunately, firsthand experiences are inherently exclusive, making it challenging for people with diverse epistemic backgrounds to appeal to the institutional testimonial credibility needed to convince others of the plausibility of their experiences and concerns. When the evidence others provide diverges from our own experiences, we tend to dismiss their testimonies as unconvincing and unreliable (Lagewaard, 2021, p. 1589).

Institutional testimonial credibility is intricately linked to distributive and procedural justice when all members of society have equitable access to resources to defend and advocate for their diverse ways of life (Dworkin, 2000). In an egalitarian society, both dominant and non-dominant groups have an equal capacity to be heard, presenting diverse evidence that is evaluated based on its merits rather than the sources. Institutional power asymmetries influence the credibility of evidence sources, which can be hindered by unequal resource distribution when some sources are deemed more reliable simply because they are more accessible for justifying culturally dominant beliefs. Distortions in institutional testimonial credibility might occur when more powerful actors who control and structure the context of reasoning exchanges (distorted reasoning context) assess the relevance and sufficiency of evidence based on culturally dominant standards of evidence processing. Consequently, institutionally dominant actors, aligned with a dominant culture of development, consumption, and mitigation, can easily rationalize a reasoning discourse favoring project developments by finding seemingly reliable and sufficient evidence, even if the project adversely affects traditional ways of life and infringes upon rights. A

dominant culture, supported by prevailing institutions, standards, and procedures of evidence exchanges, presents the most convincing arguments, justifying dominant beliefs. Cognitive psychologists recognize that only beliefs coupled with the premises (evidence) necessary to draw warranted conclusions can be convincingly used in reasoning interactivity (Kunda, 1990, p. 480). In a distorted reasoning context, the process of coupling evidence and beliefs is structured by authority rules issued by a single authority to define a situation in a mandatory way (Ostrom, 1989). I borrow the term of authority rules from institutionalists to reveal the effects of institutional power in reasoning exchanges between institutionally unequal arguers. In defining a reasoning situation, authority rules define evidence availability and acceptability via imposing standards of evidence relevance, novelty, and procedural requirements that are costs and benefits of reasoning interactivity, making it harder or easier to search, evaluate, exchange, and adjudicate available evidence to defend/challenge favorable/unfavorable beliefs. Along with resources forming the available evidential pool, the costs and benefits constitute a set of affordances and constraints attached to reasoning exchanges, forming a disagreement space and affecting opponents' reasoning capacity to use diverse evidence to support diverse beliefs.

In Indigenous hearings, the reasoning capacity to convince is a set of available or distributed by an agency's authority rules resources (evidence sources) and requirements (costs) of evidence collecting, testing, and exchanging that Indigenous arguers need to carry to produce arguments defending their beliefs. There is no research measuring reasoning capacity via measuring the costs of reasoning interactivity in a distorted reasoning context, and my research brings up this gap.

4. MOTIVATED CRITICISM AND ARGUMENT CONTINUITY IN A DISTORTED REASONING CONTEXT

If opponents exchange arguments supported by an extended evidential pool and do not need to observe burdensome requirements of evidence admissibility in using this pool (expanded disagreement space with low costs of expressing disagreement), rebutting them without reflecting upon merits would be hard. Otherwise, if disagreement space makes it hard for opponents to bring diverse evidence and use this evidence in building a convincing case for compelling priors⁴ (seized disagreement space with high costs of expressing disagreement), it would be easier to reject diverse arguments, slipping into motivated criticism.

Motivated criticism is the biased reasoning practice of negatively evaluating unfavorable evidence. When opponents are motivated to look just for flaws in opposing arguments (Klaczynski, 1997), they employ motivated criticism. Motivated critics do not consider the substance of opposing arguments (by comparing merits and demerits) but systematically criticize them, referring to the structure/design and/or source of the evidence. The source is often adjudicated as "unreliable," while the methods of collecting evidence are flawed and non-representative (Lord, Ross, Lepper, 1979). The effects of motivated criticism on evidence processing are reflected in table 1.

⁴ In this paper, terms "priors" and "beliefs" are used interchangeably.

Table 1. The effects of motivated criticism on evidence processing

Evidence processing steps/factors	Directional motivation effects
Scope of evidence search	Restrictive – evidence that supports priors; inconsistent evidence is ignored or rejected (Lodge and Charles, 2000).
The time of evidence search	The evidence search is short. Once people find supporting evidence, even a single piece of bad evidence, they often stop the search since they have a “makes-sense epistemology” in which the goal of thinking is not to reach the most accurate conclusion but to find the first conclusion that hangs together well and that fits with priors (Perkins et al., 1983).
Order of evidence evaluation	The supporting evidence is considered first, faster, and with confidence (Weber and Johnson, 2011). The evidence acquired early in a reasoning process will likely carry more weight than later (Nickerson, 1998).
The time of evidence evaluation	Limited (Kruglanski and Freund, 1983). Time pressures lead to the arousal of a need for a preselected outcome, and arguers pursue hasty thinking to attain it.
Choice of inferential rules to evaluate inconsistent evidence	Inconsistent evidence is rebutted by casting doubt on the structure and source of this evidence. The source is often considered unreliable, and the process of collecting evidence is flawed due to “insufficient, nonrandom sample size or uncontrolled variables” (Lord, Ross, Lepper, 1979).

The negative evaluations often become fallacious refutations (Klaczynski, 1997) that fail to address the opposing argument’s substance. In the worst-case scenario, motivated critics choose the least costly response strategy – repeat “tokens of the same counterarguments” (Edwards and Smith, 1996, p. 22). Those restatements are circular fallacies if they lack an evidential warranty in the relation between premises and conclusions (Walton, 1985; Tindale, 2007). Circular counterarguments disrupt an argumentative discourse in response if opponents, starting from the point of the confirming argument production (for or against prior beliefs), continue to insist upon their priors at the stage of reasoning exchanges by ignoring evidence from opponents and, at the same time, without offering new evidence by themselves. They resist testing and retesting incongenial evidence. In their counterarguments, they restate the evidence used in previously articulated arguments. This consecutive activation of two biases – the confirmation bias at the stage of argument production and the disconfirmation bias at the argument evaluation – bolsters the self-serving effect of adversarial reasoning interactivity over time. The same arguer’s biased arguments and counterarguments constitute the fallacious continuity of self-serving behavior.

In my previous papers, I conceptualized this continuity by introducing an Argument Continuity, a non-hierarchical strategy of fallacious reasoning (Pimenova, 2022; 2023). Argument Continuity is a set of arguments and counterarguments repeatedly produced and reproduced by the same motivated critic through an adversarial reasoning process to dismiss unfavorable arguments without considering their merits. The main properties of Argument Continuity are presented in table 2.

Table 2. Properties of Argument Continuity

Property	Description
The motivation	Directional, one-sided
The most likely reasoning practice	Motivated criticism
Causal mechanism	Increasing returns (bolstering effect)
The nature of inferential relations between premises and conclusions in argument and counterargument by the same arguer	Persistent lack of evidential priority
The rationale for adjudicating the nature of systematically biased reasoning	Fallacious response pattern

Argument Continuity has a viciously circular pattern of demonstration by the premises and conclusions: the premises and conclusions of the counterarguments are as doubtful as the premises and conclusions of the arguments – they are the same propositions of the same arguer facing disagreement in reasoning interactivity. Persistence lends Argument Continuity a temporal dimension: Argument Continuity is “the continuous violation” of the evidential priority at the stage of argument production and then, over time, at the stage of argument evaluation. Once the directional motivation activates the disconfirmation bias at evaluating inconsistent evidence, the fallacious response pattern’s reproduction sets into motion with increasing returns in motivated criticism. The increasing returns look like this: once a motivated critic has taken a position on an issue, s/he makes efforts to marshal evidence favoring this position, ignoring inconsistent evidence, and over time, becomes increasingly persuaded of the correctness of the arguments initially articulated (Nickerson, 1998, p. 210). More informed prior become the subject of more fierce defending, and any reasoning context, even the most perfect one in terms of the well-structured reasoning exchanges securing the diversity of evidence sources, disagreement, and the diversity of opponents, will be inevitably spoiled by the self-serving dynamics to justify whatever persuaders antecedently believe (Godfrey-Smith and Yegnashankaran, 2011, p. 80).

The bolstering effect is most likely observed in arguers who are most knowledgeable, as knowledge is a resource that makes it easier for these arguers to find more counterarguments, leading to more biased evaluations (Braman, 2009). Exhibiting agility in finding evidence sources to justify priors at the stage of argument production, more powerful arguers get more incentives to avoid learning at argument evaluation, where they are least likely to be challenged by less powerful opponents (for this reason, they are less interested in improving epistemic status by reflecting upon inconsistent evidence). When facing opposing arguments, more powerful arguers are more likely to rebut them with Argument Continuities without making efforts to engage in considering the evidential strengths and weaknesses of opponents.

Argument Continuity traces the effects of institutional power in distorted reasoning exchanges by connecting arguments, counterarguments, and reasoning practices by the more powerful arguers to the resources/incentives given by the authority rules of reasoning exchanges that set up the mechanism of increasing returns – self-reinforcing behavioral dynamics generated by power differentials to reinforce the institutional power of those who already dominate a reasoning context having an endowment of greater resources and incentives from the start of reasoning interactivity. The institutional account of a distorted

context plays its deterministic role in defining the reasoning capacity of motivated critics to evaluate arguments in a systematically biased way.

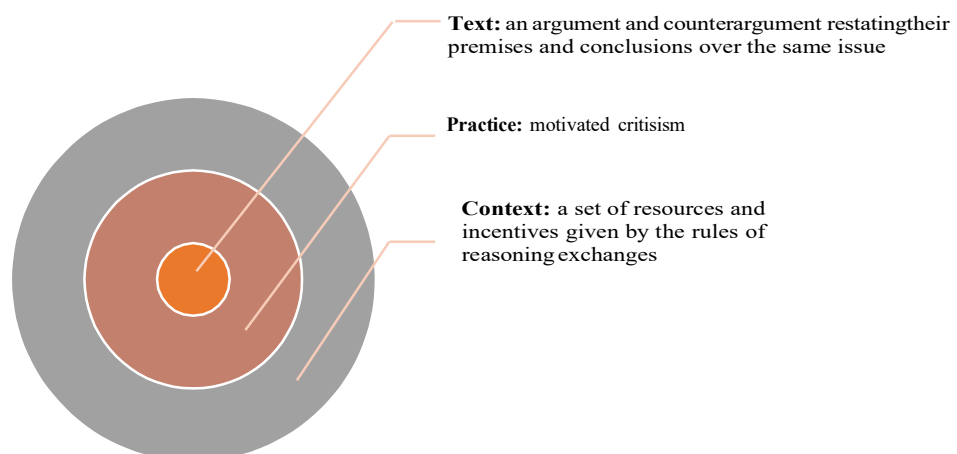
5. CASE STUDY: THE RECONSTRUCTION OF MOTIVATED CRITICISM IN THE DISTORTED CONTEXT OF THE TRANS MOUNTAIN CONSULTATIONS

This paper advances the critical discourse analysis of the Trans-Mountain Indigenous consultations with the help of Argument Continuity. Following Fairclough's (1992) theory of three levels of critical discourse analysis, Argument Continuity advances the critical discourse analysis of motivated criticism of the institutionally dominant arguers (depicted in figure 1) by tracing the resources and incentives given by their authority rules back to real instances of doing (practices) and real instances of saying (fallacies) by the institutionally dominant officials of NEB at three analytical levels:

- (1) microlevel: Argument Continuity detects the fallacious response pattern and traces this pattern reoccurrence (recurring event) through a reasoning process by reconstructing the argument and counterargument produced by the same dominant arguer in the standard argumentative scheme (illustrated by figure 2);
- (2) mesolevel: Argument Continuity reveals the hidden reasoning practice of motivated criticism (contingent event) lying behind the recurring event by sequencing the fallacious response pattern and its contingent event (illustrated by figure 3);
- (3) macrolevel: Argument Continuity explains why institutionally dominant motivated critics persist in producing the fallacious response pattern by connecting the reasoning practice of motivated criticism (contingent event) back to the resources and incentives of the reasoning context (illustrated by the contextual case study analysis).

Figure 1. Dominant discourse of motivated criticism: text, practice, and context

Source: Pimenova 2023



5.1 Microlevel analysis: circular fallacy detection

In 2018, the Federal Court of Appeal acknowledged that the consultations for the Trans Mountain Pipeline Expansion Project (TM) had failed to address Indigenous concerns adequately. It recommended that the Crown redo them. NEB was directed to initiate a new hearing stage for the TM consultations and reassess its previous findings. Consequently, NEB conducted the reconsideration round of Indigenous hearings (MH-052-2018) and issued the Reconsideration Report in 2019. This report compiled all the Indigenous concerns expressed throughout the regulatory and hearing stages, emphasizing how NEB addressed those concerns during two rounds of hearings. Both reports are utilized to reconstruct NEB's arguments and counterarguments regarding the outstanding Indigenous concerns within the standard argumentative scheme (figure 2).

Figure 2. The schemes of the argument and counterargument produced by NEB on the issue of the sensory disturbance to marine fish from TM-related underwater noise

Source: Pimenova 2023

Argument by NEB at the regulatory stage (NEB Report 2019, 340)

Premise 1: Some form of adverse, short-term effect (e.g., small behavioral changes) is likely to occur from underwater noise produced by Project-related marine vessels.

Premise 2: There is a lack of Canadian standards and limitations in data to assess the effects of Project-related underwater noise on marine fish species.

Premise 3: A detailed assessment of underwater noise produced by Project-related marine vessels on marine fish is not practicable.

Conclusion: NEB was not convinced that the short-term effects would translate into larger, more substantial impacts

Counterargument by NEB at the hearing stage (NEB report 2019, 436)

Premise 1: Some adverse, short-term effect is likely from underwater noise produced by TM-related marine vessels.

Premise 2: Potential effects on marine fish and fish habitat from Project-related marine shipping are likely to be low risk.

Premise 3: No direct evidence of mortality or unrecoverable injury to fish from underwater shipping noise.

Conclusion: NEB was still not convinced that short-term effects from Project-related marine shipping on marine fish species would translate into larger, more substantial impacts.

During the regulatory stage of the TM assessments, the industry proponent, Kinder Morgan, asserted that it did not conduct a detailed effects assessment on the potential impact of underwater noise produced by Project-related marine vessels on marine fish. This was attributed to the absence of standard criteria or thresholds to evaluate these effects. In the initial hearings of 2014, NEB concurred with the TM proponent, acknowledging a lack

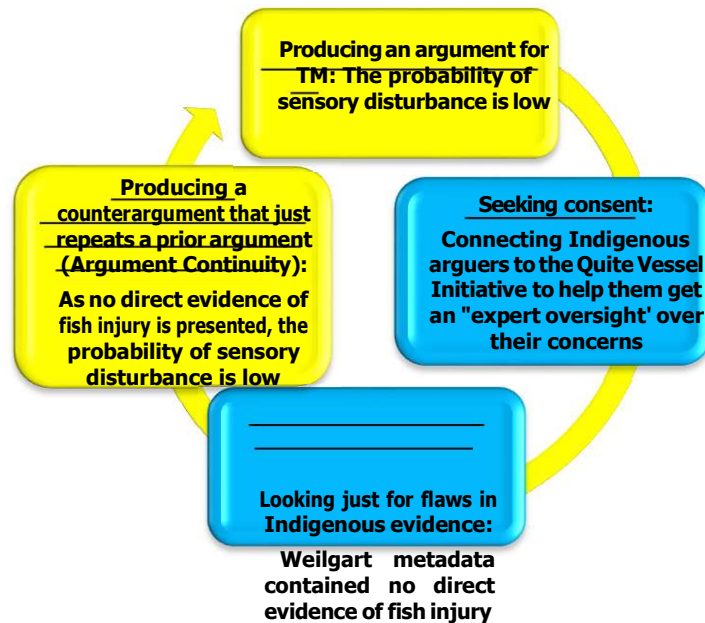
of data and standards regarding the effects of underwater noise on marine fish. In the subsequent hearings of 2018, Indigenous communities, including *Cheam First Nation*, *Chawathil First Nation*, *Kwantlen First Nation*, *Seabird Island Band*, and *Stó:lō Tribal Council*, referenced a 2018 review by Weilgart. The review highlighted studies revealing new evidence indicating that fish use sound for various purposes, such as perceiving the environment for mating, communication, and predator avoidance, and that noise can lead to adverse behavioral, physiological, anatomical, and developmental effects. Despite acknowledging the existence of new studies showing the serious effects of underwater noise on fish, NEB maintained the same view expressed in its OH-001-2014 Report. It asserted that it is unlikely for short-term effects from Project-related marine shipping on marine fish species to translate into more substantial impacts. Notably, NEB did not critically evaluate the merits of Indigenous studies on noise impacts, even when the TM proponent failed to provide evidence of fish injury from shipping noise.

5.2 Mesolevel analysis: biased reasoning practice reconstruction

I applied the theory of premises acceptability (Blair and Johnson, 1987) to evaluate the relations between premises and conclusions of the NEB argument and counterargument reconstructed in figure 2. An argumentatively valid argument should have premises relevant to its conclusion, as those premises are reasons for believing or accepting the conclusion. Moreover, premises should contain enough evidence to ‘squeeze’ the conclusion which would be relevant to them; otherwise, ‘the arguer’s task [deal with all known objections] has not been completed’ (Blair and Johnson, 1987, p. 54), and arguments/counterarguments will be counted for fallacious. As figure 2 demonstrates, the argument is fallacious because premises are irrelevant to the conclusion – they bring no independent reasons to believe in the conclusion. The same lack of relevance is observed in the structure of the counterargument. The NEB argument of 2014 employs premises and conclusions roughly equivalent in meaning to what the NEB’s counterargument of 2018 asserts in its premises and conclusions. Revealing a persistent lack of relevance of premises to conclusions, the argument and counterargument by NEB constitute a fallacious response pattern to outstanding Indigenous concerns through regulatory and hearing stages of the reasoning exchanges over the issue of TM-related underwater noise. This fallacious response pattern governs the NEB’s persistence in avoiding reflecting on the merits of Weilgart’s study. Argument Continuity connects this fallacious response pattern (a recurrent event) to motivated criticism (a contingent event) by sequencing biased reasoning practices and outcomes in a self-reinforcing direction (figure 3).

Figure 3. Dominant discourse mining pipeline: Argument Continuity on the issue of TM-related underwater noise

Source: Pimenova 2023



5.3 Macrolevel analysis: the institutional context of motivated criticism in the TM consultations

Drawing from the NEB report (2019), I identified numerous instances of Argument Continuities that reconstruct a fallacious discourse of motivated criticism regarding the unresolved Indigenous concerns on the TM-related underwater noise, diluted bitumen spills, oil spills, disruption of traditional marine resource use, and impacts on commercial, recreational, and tourism activities, as well as archaeological and cultural heritage sites. I argue that the absolute agency model adopted in the TM consultations made NEB officials susceptible to motivated criticism, as it diminished the reasoning capacity of Indigenous communities to resist TM through (1) categorizing them as intervenors, (2) imposing increasing costs for applying and participating in Indigenous hearings, and (3) institutionalizing testimonial inequality between the TM proponent and Indigenous intervenors in evaluating TM.

In the Canadian legal context, intervenors are not considered parties, lacking independent reasoning capacity (Muldoon, 1989, p. 3). In the Supreme Court of Canada's proceedings, intervenors function as experts authorized to provide insights on existing issues but are restricted from introducing independent claims (Rules of the Supreme Court of Canada, S.O.R./2002-156, r. 59(3)). In the TM hearings, Indigenous communities were accorded the status of intervenors through the application and registration process with NEB, a tribunal possessing administrative discretion in defining all aspects of Indigenous engagement, as reflected in table 2.

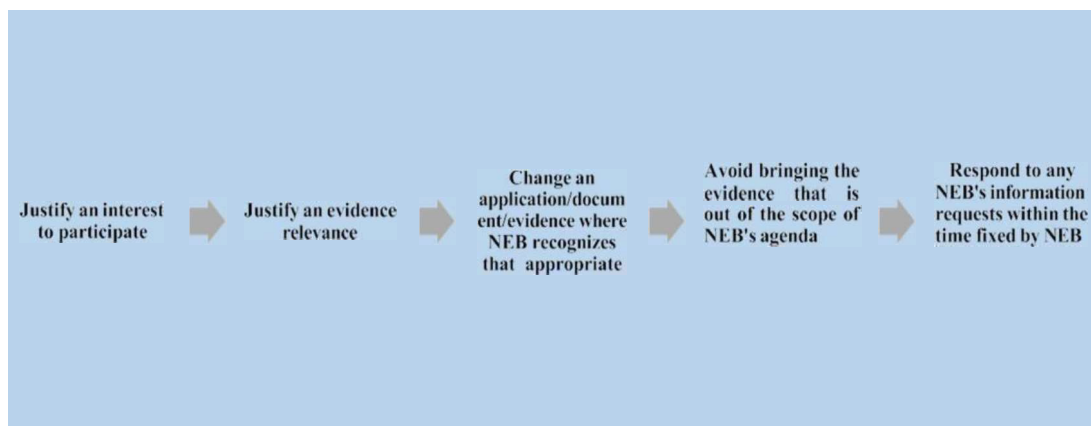
Table 2. Reasoning capacity of Indigenous communities over Trans Mountain project

Elements of reasoning capacity	NEB's discretion
Free access to a reasoning process	No – NEB granted the status of intervenors
Formation of a reasoning agenda	No – NEB determined the List of Issues to guide the scope of reasoning
Bring evidence of any content	No – nobody was allowed to bring evidence not relevant to the List of Issues
Bring evidence in any form	No – just in the prescribed form, mainly in the written form and/or verified by affidavit
Exchange evidence in any forms	No – the evidence exchanges were conducted by sending Information Requests and responding to these requests as directed by NEB
Test evidence with any procedures	No – in 2014 hearings, Indigenous communities were not allowed to cross-examine evidence orally
Observe preclusive timelines and deadlines	Yes – the passing of time led to passing the right to submit objections/documents

The costs of applying and participating in NEB's proceedings were high, as reflected in figure 4.

Figure 4. Increasing costs of an intervenor to apply and participate in NEB's proceedings.

Source: Pimenova 2023



The TM hearings resembled legal proceedings, featuring an adversarial format with interactions between the applicant (TM project proponent) and intervenors. These hearings occurred subsequent to the regulatory review of TM, and Indigenous intervenors were allowed to present their evidence only after NEB established environmental assessment parameters through its dyadic exchanges with the TM proponent, guided by NEB's Filing Requirements. These requirements served as a primary document for NEB in conducting assessments, and the proponent had to adhere to them for application acceptance.

Indigenous intervenors participating in the hearings after the completion of regulatory assessments were institutionally predisposed to have their evidence tested against the TM assessments submitted by the proponent in its application⁵. The submission order influenced the evaluation of evidence, potentially undermining the equilibrium between evidence supporting and opposing a particular option. Query theory suggests that a default option is established by providing it an advantage, such as letting arguers articulate the option first and present their justifications: “Characteristics of the choice environment often determine what option is considered first, such as the existence of decision defaults” (Weber and Johnson, 2011, p. 91). Presenting evidence for TM as the first-order evidence effectively made the perceived necessity of TM a default option around which all reasoning exchanges were organized.

In these interactions, NEB treated the assessments by the TM proponent as the “baseline” assessments for a default option. Indigenous communities’ ability to challenge these assessments was constrained by setting requirements for the acceptability of new evidence. For instance, in the 2018 Indigenous hearings, NEB limited its consideration to evidence relevant to the List of Issues outlined in the MH-052-2018 Hearing Order. By restricting the scope of the reasoning agenda, NEB constrained the evidence available to support outstanding Indigenous concerns that were not listed. New findings on the fate and behavior of diluted bitumen spills, presented by Indigenous communities in the 2018 hearings, were dismissed by NEB as not being “substantively different” from those in the records of the previous 2014 hearings (NEB Reconsideration Report, 2019, p. 191). In the 2018 hearings, NEB resisted retesting any evidence submitted in the 2014 hearings, maintaining stability in reasoning exchanges for a default option. Consequently, the ability of opponents to construct convincing cases for their beliefs was diminished (table 2).

6. CONCLUSION

The dominant culture of consumption and exploitation shapes a prevailing argumentative discourse for resource development, where the parameters of reasoning capacity, interactivity, the arguer, argument, and evidence standards are set by institutionally dominant actors who often advocate for project necessity and establish authority rules to which others must adhere to engage in reasoning exchanges. These authority rules validate the dominant discourse by attaching unequal incentives (costs/benefits) to exchanges between arguers with power asymmetries. For instance, a dominant arguer with access to more resources (evidence sources) has greater incentives to reaffirm dominant beliefs and counter opposing arguments. Conversely, less powerful opponents face constraints on using specific evidence sources (e.g., traditional oral evidence), making it easier to undermine the plausibility of their beliefs by deeming their arguments “unconvincing” and rebutting them with Argument Continuities. By limiting the reasoning capacity of Indigenous communities to critique the TM project, NEB’s rules facilitated the production of Argument Continuities in response to Indigenous arguments against the TM.

REFERENCES

- Blair, A., and Johnson, R. H. (1987). Argumentation as Dialectical. *Argumentation*, 1(1), 41–56.
- Braman, E. (2009). *Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning*. Charlottesville: the University of Virginia Press.
- Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653 Dworkin, R. (2000). *Sovereign virtue: The theory and practice of equality*. Harvard University Press.
- Edwards, K., and Smith, E. (1996). A disconfirmation bias in the evaluation of arguments. *Journal of Personality and Social Psychology*, 71(1), 5–24.
- Evans, John, Hudson Janisch, David Mullan, and RCB Risk, eds. 1995. *Administrative Law: Cases, Text, and Materials*. 4th ed. Toronto: Emond Montgomery Publications.
- Fairclough, N. (1992). *Discourse and Social Change*. Polity Press, Cambridge.
- Godfrey-Smith, P., & Yegnashankaran, K. (2011). Reasoning as deliberative in function but dialogic in structure and origin. *The Behavioral and Brain Sciences*, 34(2), 80–80.
- Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511, 2004 SCC 73
- Klaczynski, P. (1997). Bias in Adolescents' Everyday Reasoning and its Relationship with Intellectual Ability, Personal Theories, and Self-serving Motivation. *Developmental Psychology*, 33 (2), 273- 283.
- Kruglanski, A. W., & Freund, T. (1983). The freezing and unfreezing of lay-inferences: Effects on impression primacy, ethnic stereotyping, and numerical anchoring. *Journal of Experimental Social Psychology*, 19(5), 448–468.
- Kunda, Z. (1990). The case for motivated political reasoning. *Psychological Bulletin*, 108(3), 480–498.
- Lagewaard, T. J., 2021, "Epistemic Injustice and Deepened Disagreement", *Philosophical Studies*, 178(5): 1571–1592. doi:10.1007/s11098-020-01496-x
- Lodge, M., Charles, T. (2000). Three steps toward a theory of motivated political reasoning. In A. Lupia, M. McCubbins, and S. Popkin (Eds.), *Elements of reason. Cognition, choice, and the bounds of rationality*. London: Cambridge University Press.
- Lord, C., Ross, L., and Lepper, M. (1979). Biased assimilation and attitude polarization: The effects of prior theories on subsequently considered evidence. *Journal of Personality and Social Psychology*, 37(11), 2098–2109.
- Muldoon, P.R. (1989). *Law of Intervention*. Aurora, Ont.: Canada Law Book.
- National Energy Board Reconsideration Report - Trans Mountain Pipeline ULC - MH-052-2018. Available at <https://apps.cer-rec.gc.ca/REGDOCS/Item/Filing/A98021>
- Nickerson, R. S. (1998). Confirmation Bias. *Review of General Psychology*, 2(2), 175–220. Ostrom, E. (1986). An agenda for the study of institutions. *Public Choice*, 48(1), 3–25.
- Perkins, D. N., Allen, R. & Hafner, J. (1983) Difficulties in everyday reasoning. In: *Thinking: The expanding frontier*, ed. W. Maxwell, pp. 177 – 89. Franklin Institute Press.
- Pimenova, O. (2022). Argument Continuities in Theory and Practice: Evidence from Canada. *Journal of Argumentation in Context*, 11(2), 200–242.
- Pimenova, O. (2023). Advancing critical discourse analysis of Indigenous consultations: Argument Continuity v. epistemic vigilance. *Critical Policy Studies*, ahead-of-print(ahead-of-print), 1–22.
- Tindale, C. (2007). *Fallacies and Argument Appraisal*. Cambridge University Press: New York. Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153 (CanLII).
- Valadez, J. (2010). Deliberation, cultural difference, and Indigenous self-governance. *The Good Society*, 19 (2), 60–65.
- Walton, D. N. (1985). Are Circular Arguments Necessarily Vicious? *American Philosophical Quarterly* (Oxford), 22(4), 263–274.
- Weber, E., Johnson, E. (2011) Query theory: Knowing what we want by arguing with ourselves. *The Behavioral and Brain Sciences*, 34(2), 91–92.

⁵ For example, alternative locations for building TM, proposed by Tsleil-Waututh Nation at the 2018 hearings, were rejected by NEB as 'not supported by the Board's filing requirements' (NEB report, 2019, p. 386).